No. 88-1297

Supreme Court, U.S.
FILED
JAN 30 1989
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1988

MARVIN GLICK and BAUM, GLICK & WERTHEIMER,

Petitioners,

vs.

BASIL GEORGES, ALEXANDER GEORGES, GEORGE J.GEORGES, TED GEORGES, DOROTHY G. STACY, EFROSINI DEREHANIS and DORA DEREHANIS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

THEODORE A. SHAPERO
RUDNICK & WOLFE
203 North LaSalle Street
Suite 1800
Chicago, Illinois 60601
(312) 368-4021

WILLIAM S. WIGODA
PETER A. QUILICI
HORVATH & WIGODA
300 West Washington St.
17th Floor
Chicago, Illinois 60606
(312) 419-6600

Pandick Technologies, Inc., Chicago • (312) 236-0200

HIPP

QUESTION PRESENTED

Whether the probate exception to diversity jurisdiction applies to a civil action which raises issues concerning the validity of a revocable *inter-vivos* trust funded by a will on the basis of the settlor-decedent's incompetency and the exercise of undue influence upon him when identical issues were raised in two prior cases which were settled and when the civil action will result in joinder of the settling main trust beneficiary after distribution of the trust estate.

Parties to the Proceeding

The caption of the case contains the names of all parties.

TABLE OF CONTENTS

Page

Question presented for review i

Parties to the proceeding ii

Table of Authorities iv

Opinions below 2

Jurisdiction 2

Statutes involved 2

Statement of the case 2

Reasons for granting the Petition 10

A. The appellate court's opinion violates Illinois public policy 10

B. The appellate court misinterpreted Illinois case law 14

Conclusion 17

Proof of Service 18

Appendix A 1a

Appendix B 9a

Appendix C 10a

Appendix D 11a

Appendix E 12a

TABLE OF AUTHORITIES

Cases: *Page(s)*

Anderson vs. Marquette National Bank, 164 Ill.App.3d 626, 518 N.E.2d 196 (1st Dist. 1987) . . . 13

Angel vs. Bullington, 330 U.S. 183, 67 Sup.Ct. 657, 91 L.ed 832 (1947) 14

Dragon vs. Miller, 679 F.2d 712 (7th Cir. 1982) 6-8

Guaranteed Trust Company of New York vs. New York, New York, 326 U.S. 99, 65 Sup.Ct. 1464, 89 L.ed. 2079 (1945) 14

Ogle vs. Fuiten, 102 Ill.2d 356, 466 N.E.2d (1984) 10, 14-16

Rice vs. Rice Foundation, 610 F.2d 471 (7th Cir. 1979) 8

Robinson vs. First State Bank of Monticello, 97 Ill.2d 174, 454 N.E.2d 288 (1983) 5-12, 14-16

Constitution, statutes and regulations:

Ill.Rev.Stats., ch.110 1/2, sec. 8-1(a) 5, 7, 8, 11, 12

Ill.Rev.Stats., ch. 110, sec. 13-223 . . . . . 6, 12, 13, 16

No. _____

In The
Supreme Court of the United States
October Term, 1988

MARVIN GLICK and BAUM, GLICK & WERTHEIMER,

Petitioners,

vs.

BASIL GEORGES, ALEXANDER GEORGES, GEORGE J. GEORGES, TED GEORGES, DOROTHY G. STACY, EFROSINI DEREHANIS and DORA DEREHANIS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

PETITION FOR CERTIORARI

Theodore A. Shapero, on behalf of Marvin Glick and Baum, Glick & Wertheimer, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App.A,infra,1a-8a) is reported at 856 F. 2d 971. The opinion of the district court (App.E,infra,12a-18a) is not reported.

JURISDICTION

The judgment of the court of appeals (App.B,infra,9a) was entered on September 14, 1988. A petition for rehearing and suggestion for rehearing in banc were denied on October 31, 1988 (App.C,infra,10a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

1. The Illinois Probate Act at Ill.Rev.Stats., ch. 110 1/2, sec. 8-1(a) provides in relevant part:

> Sec. 8-1. Contest of admission of will to probate. (a) Within 6 months after the admission to probate of a domestic will in accordance with the provisions of Section 6-4, or of a foreign will in accordance with the provisions of Article VII, any interested person may file a petition in the proceeding for the administration of the testator's estate or, if no letters were issued, in the court in which the will was admitted to probate, to contest the validity of the will.

2. The Illinois Code of Civil Procedure at Ill.Rev.Stats. ch. 110, sec. 13-223 provides:

> Sec. 13-223. Inter vivos trusts. An action to set aside or contest the validity of a revocable inter vivos trust agreement or declaration of trust to which a legacy is provided by the settlor's will which is admitted to probate, shall be commenced within and not after the time to contest the validity of a will as provided in the Probate Act of 1975 as amended.

I. STATEMENT OF THE CASE

This case involves the Estate of Mr. William Deree and, in particular, the William S. Deree Revocable Trust

(hereinafter the "Trust"). The Trust was created by Mr. Deree on January 20, 1978. At the same time, Mr. Deree executed a will which left his property to the Trust. The Trust and will were drafted by petitioning attorney Marvin Glick, who is a partner with the Chicago, Illinois law firm of Baum, Glick and Wertheimer, also petitioning herein.

The Trust's dispositive provisions, to take effect on Mr. Deree's death, provided for payments of six hundred thousand dollars ($600,000.00) to his wife, Roberta Deree, with the remainder of the estate passing to Mr. Deree's thirteen nieces and nephews or their descendants, living at the time of his death. Other Trust terms included Mr. Deree's right to amend and revoke the Trust at any time and that Illinois law would govern the Trust's validity.

From 1978 to 1980, Mr. Deree amended the Trust three times to remove and appoint trustees and to provide additional payments to his wife.

On May 29, 1981, Mr. Deree amended his Trust for the fourth time. The fourth Trust amendment, which was drafted by petitioner Glick, significantly altered Mr. Deree's testamentary scheme by granting, upon his death, five thousand dollars ($5,000.00) each to his thirteen nieces and nephews or their descendants, living at the time of his death, with the remainder of the Trust going to his wife Roberta. The fourth amendment increased Roberta's share of the estate from approximately seven hundred thousand dollars ($700,000.00) to approximately two million dollars ($2,000,000.00) and significantly reduced the nieces' and nephews' inheritance.

Almost one and one half years after the fourth Trust amendment, the settlor, Mr. Deree, died on November 8, 1982 in Maricopa County, Arizona at the age of 91 years. Mr. Deree's will was filed for probate on June 13, 1983 in the Superior Court for Maricopa County, Arizona.

In July, 1983, seven of Mr. Deree's thirteen nieces and nephews filed suit to contest the validity of the Trust as

amended in the Maricopa County, Arizona, Superior Court against Mr. Deree's widow, Roberta, and Rex Wilson, in their individual capacity and in their capacity as trustees of the Trust. The nieces and nephews alleged in their Arizona complaint that they were entitled to a declaration that the fourth Trust amendment was void due to Mr. Deree's lack of mental capacity and the undue influence exerted on him by his wife, Roberta Deree. The nieces and nephews further alleged that Roberta Deree and Ben Beckerman, a deceased trustee and accountant to Mr. Deree, breached duties owed to them as the Trust beneficiaries by influencing Mr. Deree to make the fourth Trust amendment, thereby entitling the nieces and nephews to return of property or monies received by Roberta Deree and an award of attorneys' fees and punitive damages.

During January, 1984, one of the nephews, a resident of Illinois, filed a substantially identical complaint against Roberta Deree and Rex Wilson in the Cook County, Illinois, Circuit Court. The Illinois complaint asserted in support of the Illinois court's jurisdiction that the trustees were citizens and residents of Illinois and that the corpus of the Trust was located in Illinois. The Illinois action was stayed pending the outcome of the Arizona litigation.

On July 3, 1985, Mr. Deree's thirteen nieces and nephews entered into a settlement agreement with Roberta Deree and Rex Wilson concerning all Trust related claims. Among its terms, the settlement agreement provided for dismissal with prejudice of the Arizona and Illinois Trust related litigation.

On January 30, 1986, respondents, all parties to the settlement agreement, filed the subject diversity action against the petitioners. Respondents allege that they were the primary beneficiaries of petitioners' relationship with Mr. Deree regarding preparation of Trust documents. They further allege that petitioners knew that the Trust settlor, William Deree, was "mentally incompetent, nearly blind

and deaf, and acting under the undue influence" of Roberta Deree and Benjamin Beckerman at the time of the May 29, 1981 Trust amendment prepared by petitioners. Based on those allegations, respondents seek recovery for diminution of their pre-81 Trust expectancy and punitive damages from petitioners under theories of breach of contract, legal malpractice, breach of fiduciary duty and tortious interference with inheritance.

In the district court, the petitioners filed a motion for summary judgment and the respondents filed a cross-motion for partial summary judgment. On December 4, 1987, the district court issued its minute order and memorandum order dismissing the case for lack of subject matter jurisdiction due to the probate exception to federal diversity jurisdiction (App. D and E, infra, 11a-18a).

In its order, the district court recited the dispositive facts of the case and rejected one of petitioners' arguments that respondents' claims were an impermissible collateral attack on the validity of the Trust under the applicable Illinois law and public policy (App.E, infra, 12a-15a). On this point, petitioners argued that respondents were barred from again raising issues regarding the Trust settlor's incompetency and the exercise of undue influence upon him after they had ample opportunity to fully litigate those issues both in Arizona and Illinois. Petitioners' argument partly relied on the Illinois Supreme Court case of *Robinson vs. First State Bank of Monticello*, 97 Ill.2d 174, 454 N.E.2d 288 (1983) which prohibits tort actions which in reality are will contests seeking to circumvent the exclusivity of the six month limitation set forth in the Illinois Probate Act which governs will contests. The Illinois Probate Act requires commencement of will contests within six months after a will is admitted to probate. Ill.Rev. Stats., ch. 110 1/2, sec. 8-1 (hereinafter "Section 8-1"). Petitioners further argued that *Robinson's* holding and its public policy concerns for orderly administration of estates were applica-

ble to the subject case by way of Ill.Code Civ. Pro Rule 13-223 (Ill.Rev.Stats., ch. 110, sec. 13-223) (hereinafter "Rule 13-223"), which requires that actions contesting the validity of a revocable *inter-vivos* trust funded by a will, such as the Trust, shall be commenced within the same six month period to contest the validity of a will as required by the Illinois Probate Act. (Mr. Deree's will was admitted to probate in Arizona on August 12, 1983; however, the date of admission was not presented to the district court.)

Relying on Rule 13-223 and *Robinson*, petitioners argued that the validity of the Trust could no longer be questioned, as respondents seek to do, at this late date after settlement of the two preceding Trust contests initiated in both Arizona and Illinois and the distribution of Mr. Deree's estate. Petitioners further argued that respondents' suit, if permitted to proceed, would result in the joinder of the Trust's primary beneficiary, Mrs. Roberta Deree, which would in turn violate Illinois' concern for the orderly administration of estates, which extended to the Trust via Rule 13-223.

In its memorandum order, the district court analyzed the Rule 13-223 limitation and concluded that it was inapplicable to the Trust because the funding will was probated in Arizona instead of Illinois. As a result, the district court rejected petitioners collateral attack argument (App. E, infra, 14a-15a). However, the district court, *sua sponte*, went on to analyze the applicability of the probate exception to federal diversity jurisdiction.

In its probate exception analysis, the district court first turned to the 7th Circuit's opinion in *Dragon v. Miller*, 679 F.2d 712 (7th Cir. 1982), which applied the probate exception to a diversity case governed by Illinois law (App.E, infra, 16a-16a). The *Dragon* plaintiffs sought return of an inheritance on the basis of tort claims asserting undue influence in the procurement of a will, after probate proceedings had concluded without a will contest.

Relying on *Dragon*, the district court noted the objectives served by the probate exception, which included: (a) legal certainty regarding whether a federal or a state court would decide the validity of wills; (b) deference to the relative expertise of state courts in probate matters; and (c) facilitating judicial economy (*id.* at 15a). The district court further noted the *Dragon* court's finding that the foregoing objectives would be weakened if Illinois allowed the claims before it to escape the exclusive provisions of the six-month limitation to initiate a will contest found at Section 8-1 of the Illinois Probate Act (*id.*). Although the *Dragon* court lacked Illinois precedent for guidance, it predicted that Illinois would hold Section 8-1 of the Probate Act applicable and accordingly concluded that the case before it fell within the probated exception (*id.* at 16a).

The district court's analysis then turned to the Illinois Supreme Court case of *Robinson vs. First State Bank of Monticello, supra*, which was decided after *Dragon* (*id.* at 16a). Therein, the plaintiff sought recovery from a bank acting as the executor of an estate for breach of fiduciary duty for the executor's failure to disclose a document which allegedly precluded plaintiffs from filing a will contest (*id.*). The district court noted that in *Robinson* the Illinois Supreme Court affirmed the Illinois Appellate Court's dismissal of the count directed against the bank on the ground "that recovery would have first required a determination that the will, which had been probated without contest, was invalid" (*id.*). The district court found this reasoning significant because the present claims also require respondents to "prove that the provisions of the trust amendment could have been set aside if they were contested in the Arizona probate proceeding" (*id.* at 16a).

Of more significance to the subject case, the district court observed that the *Robinson* plaintiffs also "sought recovery against an attorney who they claimed unduly influenced the testator into executing a will which made

the attorney the beneficiary of a substantial amount of money" (*id.* at 17a). The *Robinson* court affirmed the trial court's dismissal of the claims against the attorney by stressing "that the purpose of Section 8-1 was to insure the orderly administration of decedents estates" (*id.* citing *Robinson*). The district court also took note of the Illinois Supreme Court's reasoning in *Robinson* that permitting the tort action would, in reality, invalidate a will that had become valid under the Illinois Probate Act, thereby giving plaintiffs a "second bite of the apple" (*id.*).

Implicitly recognizing that the *inter-vivos* trust at issue was essentially a will substitute, the district court found that the *Robinson* opinion placed a "premium on the finality of probate proceedings and forbids interference with the distribution of estates long after such proceedings have concluded" (*id*). Realizing that the subject suit would result in a third party action against the main trust beneficiary, Mrs. Roberta Deree, the district court then went on to discuss the applicability of the probate exception's objectives as disclosed in *Dragon*, ultimately ruling that the present case was dismissed for lack of subject matter jurisdiction (*id.* at 17a-18a).

On appeal, the 7th Circuit Court of Appeals reversed. In its opinion, the appellate court discussed the judicial origin of the probate exception and observed that its precise scope had not been clearly established, although it noted that probate of a will is certainly within the exception (App. A, infra, 4a-5a). The appellate court further observed that courts will apply the probate exception to suits ancillary to probate, however the definition of that term is unsettled. Relying on *Dragon*, *supra*, and *Rice vs. Rice Foundation*, 610 F. 2d 471 (7th Cir. 1979), the appellate court identified several bases for application of the probate exception which included: (a) historical; (b) a need for legal certainty concerning whether probate matters and will contests should be in a state or federal court; (c) judi-

cial economy; and (d) avoidance of unnecessary interference with state probate proceedings (*id.* at 5a-6a).

The appellate court found that neither the historical considerations nor the consideration of certainty in probate matters applied in this case (*id.* at 6a). Although the court concluded that the Trust was "clearly a will substitute," the court stated that this case does not involve probate of a will nor does it directly affect the probate *res* (*id.* at 6a, fn2). Instead, the appellate court stated that the estate had been distributed conclusively in the Arizona probate and this case involved only allegations of an attorney's misfeasance in preparation of an *inter-vivos* trust (*id.*). Based on this reasoning, the court rejected petitioners' argument that the potential liability of Mrs. Deree through a third party action rendered this case a continuation of the probate proceeding requiring application of the probate exception (*id.*). Instead, the court concluded that it was Mrs. Deree's own personal assets, not those of the decedent, which would be placed in jeopardy in the event petitioners filed a third party action against her (*id.*).

The appellate court also found that judicial economy would not be furthered because the subject case against petitioners could only be brought in Illinois because petitioners were not amenable to personal jurisdiction in Arizona (*id.* at 6a-7a).

The appellate court also addressed the final rationale underlying the probate exception, which is the avoidance of unnecessary interference with state probate proceedings. Under this point, the appellate court recognized the Illinois Supreme Court case of *Robinson v. First State Bank of Monticello, supra*, which "held that all will contests–including causes of action which, although will contests in name, have the effect of challenging the validity of the will–must be resolved in a single proceeding" (*id.* at 7a). However, the appellate court decided that the *Robinson* holding had been restricted by the Illinois Supreme Court

in *Ogle v. Fuiten*, 102 Ill.2d 356, 466 N.E.2d 224 (1984), which "held that claims for negligence and breach of contract against an attorney in connection with the drafting of a will are not properly part of a will contest" (*id.*) Relying on *Ogle* as "the relevant guidepost for this case," the appellate court concluded that the subject case does not present a matter ancillary to the probate of the will and reversed the district court's dismissal based upon the probate exception (*id.* at 7a-8a).

REASONS FOR GRANTING THE PETITION

In reaching its ruling regarding the probate exception's application to the present case, the 7th Circuit Court of Appeals has misapprehended the nature of the claims asserted herein and misinterpreted and misapplied Illinois Supreme Court cases which govern claims seeking to question the validity of wills in legal malpractice claims dealing with estate related services. Furthermore, the appellate court's ruling on the probate exception is in direct conflict with Illinois statutes and case law and the Illinois public policy reflected therein which values stability in the administration of estates. The conflict is especially egregious because it creates the anomalous situation whereby a federal court exercising its diversity jurisdiction in Illinois will permit jurisdiction over claims which the Illinois state courts would readily dismiss on the basis of policy concerns which coincide with the objectives served by the probate objection. The conflict so created cannot be allowed.

A. THE APPELLATE COURT'S OPINION VIOLATES ILLINOIS PUBLIC POLICY.

In its opinion, the appellate court recognized that one of the rationales which govern application of the probate exception is the desire of the federal courts to avoid unnecessary interference with state probate proceedings. Recognizing that Illinois law and policy controlled its analysis on this point, the appellate court first turned to the Illinois Supreme Court decision of *Robinson v. First State*

Bank of Monticello, 97 Ill.2d 174, 454 N.E. 2d 288 (1983). The appellate court's consideration of *Robinson* was especially appropriate under the circumstances, because once the appellate court recognized that the *inter-vivos* trust at issue is in reality a will substitute, *Robinson's* facts and holding are dispositive of this case. Inexplicably, the appellate court decided otherwise.

In *Robinson*, the plaintiff heirs filed a three count complaint against the executor for the decedent's estate and against the decedent's attorney, who also was a legatee under the decedent's will, which had already been admitted to probate without contest. *Id.* N.E.2d at 291,292. The allegations against the decedent's attorney claimed that he owed the testator a fiduciary duty which was breached when he induced the testator to execute a will and codicil making him the primary beneficiary of the estate and which also cancelled a large debt owed to the testator. *Id.* The *Robinson* court characterized the claims against the attorney as alleging that the decedent's will and codicil were the product of the attorney's fraud and undue influence and that, therefore, he allegedly tortiously interfered with their inheritance. *Id.* N.E.2d at 293. Claims of breach of fiduciary duty, undue influence, and tortious interference with an inheritance are also present in the subject case in relation to the Trust, but their significance was not discussed or apprehended by the appellate court in its reference to *Robinson*.

In affirming the trial court's dismissal of the claims against the attorney, the *Robinson* court turned to Section 8-1 of the Illinois Probate Act (Ill.Rev.Stats. ch. 110 1/2, sec. 8-1) which requires actions contesting the validity of a will to be brought within six months after the will is admitted to probate. *Id.* N.E.2d at 293. Observing that the will and codicil under consideration had been submitted to Illinois probate without contest, the *Robinson* court concluded that the validity of the will and codicil had been

established for all purposes. *Id.* N.E.2d at 294. Therefore, it refused to permit the circumvention of Section 8-1 through a tort action which, in its practical effect, would invalidate a will that had become valid under the Illinois Probate Act. *Id.*

The petitioners submit that the significance and applicability of *Robinson's* holding, which were not observed or discussed in the appellate court opinion, arise from the Illinois policy considerations which form the foundation of *Robinson*. The *Robinson* court declared that the purpose of Section 8-1 was "to limit the time within which the validity of a will may be questioned and to create stability in the administration of estates" and "to make the administration of an estate as orderly as possible because of the gravity of the interest at stake." *Id.* The district court correctly characterized the Illinois' policy reflected in *Robinson*, as its concern for finality in estate proceedings (App.E, infra, 17a). Certainly, Illinois' concern for finality parallels the probate exception's concern for legal certainty and judicial economy.

If the instrument involved in the case was a will, no serious argument could be made that the respondents' claims asserting that the hypothetical will was invalid at this date would be barred by Illinois policy disclosed in Section 8-1 requiring such claims to be filed within six months of the will's admission to probate. Petitioners submit that the identical policy concern for finality governs this case, and it is seriously disturbed by the appellate court's ruling.

The Illinois policy consideration requiring timely and prompt determination of a will's validity is also applicable to *inter-vivos* trusts funded by a will, such as the Trust, because of Rule 13-223 (Ill.Rev.Stats. ch.110, sec 13-223) which requires that an action seeking to set aside or contest the validity of such a trust must be commenced within the same time period for contesting the validity of a will. Obviously, Illinois considers that wills and trusts funded

by them are part of one unified estate device thereby requiring similar treatment. Certainly, this unified policy consideration, along with the probate exception's concern for finality, is violated if respondents are permitted to again litigate the issues of the Trust settlor's competence and undue influence at this late date, long after probate of his will and settlement of prior similar litigation.

The application of Rule 13-223 to the subject case was argued by petitioners but rejected by the district court because the funding will was not probated in Illinois. Its policy concern was presented by petitioners to the appellate court but not discussed by it and apparently rejected. Perhaps, the appellate court's silence was tacit approval of the district court's position. Both courts are mistaken because of a relatively recent Illinois appellate court case which found Rule 13-223 applicable to a trust funded by a will although the will was submitted to probate outside Illinois. *Anderson vs. Marquette National Bank*, 164 Ill.App.3d 626,518 N.E.2d 196 (1st Dist. 1987).

The appellate court avoided application of Illinois' and the probate exception's parallel policy considerations relating to decedent's estates generally and the Trust-will substitute in particular by rejecting petitioners' argument that the orderly administration of Mr. Deree's estate would be disturbed because the main beneficiary, his wife, could be joined in a third party action herein if the case were to proceed. On this point, the appellate court concluded that Mr. Deree's estate had been distributed conclusively in the Arizona probate action and that if Mrs. Deree were found liable in this case, her assets and not those of her husband's estate would be placed in jeopardy (App. A, infra, 6a).

Petitioners respectfully submit that the appellate court's reasoning on the foregoing point is flawed and it eviscerates Illinois public policy which values the finality of estate distributions as reflected in *Robinson* and Rule 13-223. The appellate court has created a paradox whereby,

on the one hand, it apparently recognizes Illinois' policy and the probate exception's objectives to guard the finality of estates, but, on the other hand, it will permit an estate beneficiary, such as Mrs. Deree, to answer to disappointed beneficiaries in damages to be drawn from her assets which include her inheritance by third party joinder to an action which by its nature requires determination of issues such as incompetence and undue influence, after she settled two prior suits involving identical issues. The concept of finality cannot be so handily dismissed. Finality must also include protection of the distributed estate within its purview. Otherwise, it is a hollow concept without purpose.

The petitioners submit that the foregoing policy concerns were overlooked by the appellate court, although presented to it by petitioners. The principles of diversity jurisdiction require the federal courts to enforce both Illinois law and policy so the outcome of this diversity based case will be substantially the same if tried in a federal or an Illinois state court. *Angel vs. Bullington*, 330 U.S.183, 67 Sup.Ct. 657, 91 L.ed 832 (1947); *Guaranteed Trust Company of New York vs. New York, New York*, 326 U.S. 99, 65 Sup.Ct. 1464, 89 L.ed. 2079 (1945). The application of the probate exception required the appellate court to analyze Illinois law and policy concerns, which the appellate court did not do. As a result, petitioners submit that the appellate court has ruled in a manner which seriously violates Illinois law and policy and has erroneously permitted jurisdiction over a case which the Illinois court's would decline to hear, thereby requiring the U.S. Supreme Court to review the appellate court's ruling.

B. THE APPELLATE COURT MISINTERPRETED ILLINOIS CASE LAW.

Instead of finding *Robinson* the relevant guidepost in this case, the appellate court chose to rely on the Illinois Supreme Court case of *Ogle v. Fuiten*, 102 Ill.2d

356, 466 N.E.2d 225 (1984). The appellate court, without substantive discussion or reasoning, concluded that *Ogle* "restricted" *Robinson* and that *Ogle's* holding, that claims for negligence and breach of contract against an attorney in connection with the drafting of a will are not part of a will contest, was the governing guidepost in this case (App. A, infra, 7a). The appellate court is clearly mistaken.

In *Ogle*, the Illinois Supreme Court was confronted with a legal malpractice action brought by named beneficiaries in a will whose expectancies failed because of drafting errors in the will. Specifically, the drafting errors involved failure of the drafting attorney to provide for a near-simultaneous death situation in wills he drafted for a husband and wife, resulting in the plaintiffs' expectancy passing by intestacy to other persons. *Id.* N.E.2d at 225, 226. The trial court dismissed the claims against the attorneys, but the appellate court reversed and the Illinois Supreme Court affirmed the reversal. *Id.* N.E.2d at 225, 228.

In reaching its ruling, the *Ogle* court considered defendant's arguments, which relied on *Robinson*, *supra*, that the malpractice action was an impermissible collateral attack upon the judicial determination of the validity of the testator's will. *Id.* N.E.2d at 227. The *Ogle* court rejected defendant's argument relying on *Robinson* because *Robinson* involved allegations that the testator had been subject to the undue influence of her attorney, which type of claim should have been raised in an available will contest *Id.* Unlike *Robinson* and the subject case, the *Ogle* court observed that the complained of drafting errors could not have been raised in a will contest. *Id.*. Also unlike *Robinson* and the subject case, a successful verdict in favor of the *Ogle* plaintiffs would not disrupt the orderly disposition of the testator's property; would not effect the probate administration which preceded the case; and would not effect the provisions of the will. *Id.* Contrary to the appel-

late court's conclusion that the Illinois Supreme Court restricted *Robinson* in *Ogle*, the Illinois Supreme court in *Ogle* only distinguished *Robinson* because of the foregoing dissimilarities which rendered *Robinson* inapplicable to a drafting error case. *Id.*

The obvious principle of Illinois law to be derived from *Ogle* and *Robinson* is that claims against attorneys in connection with the drafting of a will, or in this case a will substitute, are permissible to the extent that they do not draw into contention the validity of a will which can no longer be questioned because a will contest was previously available. Having found the Trust a will substitute, the appellate court was bound to find *Robinson* applicable because the respondents seek to question the validity of the Trust-will substitute on the basis of undue influence and settlor incompetency when those issues can no longer be questioned in Illinois because of Rule 13-223 and the two prior Trust contests settled by respondents. The necessary determination of the Trust's validity in the subject case was readily observed by the district court but overlooked by the appellate court. Considering its reliance on *Ogle*, the appellate court has misunderstood the nature of the case by characterizing it as a legal malpractice case when, in reality, it is the third trust contest involving the Trust.

In light of the foregoing, the appellate court's conclusion that "*Ogle* held that claims for negligence in breach of contract against an attorney in connection with the drafting of a will are not properly part of a will contest" (App. A, infra, 7a), without excluding claims drawing the validity of wills into question after probate without contest, is simply wrong and misstates Illinois estate and legal malpractice law.

The appellate court's reliance on *Ogle* renders its opinion erroneous because *Ogle* serves as the opinion's guidepost. More importantly, the court's misstatement of Illinois estate and malpractice law serves as faulty precedent in

future diversity cases governed by Illinois law. Correction of this error requires review by the U.S. Supreme Court.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

BY: _____

THEODORE A. SHAPERO
RUDNICK & WOLFE
203 North LaSalle Street
Suite 1800
Chicago, Illinois 60601
(312) 368-4021

AND

WILLIAM S. WIGODA
PETER A. QUILICI
HORVATH & WIGODA
300 West Washington St.
17th Floor
Chicago, Illinois 60606
(312) 419-6600

Attorneys for Petitioners

Proof of Service

Theodore A. Shapero, hereby states that, to his knowledge, forty copies of the Petition for Writ of Certiorari on behalf of Marvin Glick and Baum, Glick & Wertheimer were deposited in a U.S. mail box, with first class postage pre-paid and properly addressed to the Clerk of the Supreme Court of the United States, on Friday, January 27, 1989 and that the mailing occurred within the time period for filing the Petition. Three copies of the Petition were similarly mailed on the same date to counsel representing the remaining parties herein.

/s/ Theodore A. Shapero
Theodore A. Shapero

Subscribed and Sworn
to me this ___ day of
January, 1989.

_____
Notary Public

APPENDIX A

In the
United States Court of Appeals
For the Seventh Circuit

No. 87-3129

BASIL GEORGES, ALEXANDER GEORGES, GEORGE J. GEORGES, TED GEORGES, DOROTHY G. STACY, EFROSINI DEREHANIS, and DORA DEREHANIS,

Plaintiffs-Appellants,

v.

MARVIN GLICK, and BAUM, GLICK & WERTHEIMER,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 86-C-0747—**Charles R. Norgle,** *Judge.*

ARGUED MAY 17, 1988—DECIDED SEPTEMBER 14, 1988

Before CUDAHY, FLAUM, and RIPPLE, *Circuit Judges.*

RIPPLE, *Circuit Judge.* This is an appeal from an order of the district court dismissing the case for lack of subject matter jurisdiction. The court determined that it did not have jurisdiction because the suit fell within the "probate exception" to federal diversity jurisdiction. We reverse the judgment of the district court.

I

Background

On January 20, 1978, William S. Deree executed his last will and testament. The will was drafted by the defendant, Marvin Glick, and provided that all of Mr. Deree's property would be left to the William S. Deree Revocable Trust (the Trust). The Trust documents also were prepared by Mr. Glick and were executed on the same day. At this time, Mr. Deree and his second wife, Roberta Deree, entered into a post-nuptial agreement. The post-nuptial agreement and the Trust limited Mrs. Deree's interest in the Trust to $600,000, to be distributed upon Mr. Deree's death.[1] The balance of the trust corpus was to be distributed in equal shares upon Mr. Deree's death to his thirteen nieces and nephews.

On May 29, 1981, Mr. Deree amended the Trust. This amendment provided that, upon Mr. Deree's death, each of his nieces and nephews would receive $5,000 and Mrs. Deree would receive the balance of the trust estate. This amendment was drafted by Mr. Glick and had the effect of increasing Mrs. Deree's share of the trust from approximately $700,000 to approximately $2,000,000.

Mr. Deree died on November 8, 1982 at the age of ninety-one. He had been a long-time resident of Illinois, but was domiciled in Arizona when he died. On June 13, 1983, Mr. Deree's personal representative filed an application for informal probate of Mr. Deree's will in Arizona state court. In July 1983, Mr. Deree's thirteen nieces and nephews filed a separate action in an Arizona court (the Arizona suit) against, *inter alia*, Mrs. Deree. Mr. Glick was not a defendant in this suit. The Arizona suit sought to void the May 1981 amendment to the Trust on the grounds that Mr. Deree was mentally incompetent and

[1] The Trust was amended soon after its execution to provide that Mrs. Deree would also receive funds to satisfy a mortgage on the Deree residence in Arizona. At the time of Mr. Deree's death this mortgage was approximately $100,000.

was under undue influence at the time that he executed it. This suit was filed in the Civil Division of the Superior Court of Maricopa County, Arizona. Mrs. Deree filed a motion to transfer the suit to the Superior Court's Probate Division, but this motion was denied. *See Georges v. Wilson*, No. C 492073, order at 1 (Super. Ct. Ariz., Mar. 22, 1985); Appellants' App. at 27a. Before the case went to trial, the plaintiffs entered into a settlement agreement with Mrs. Deree pursuant to which the nieces and nephews received a total of $500,000 plus attorneys' fees. Because Mr. Glick and his law firm were not parties to this suit, they were not parties to the settlement agreement. Consequently, the terms of this settlement did not purport to release potential claims against them.

On January 30, 1986, seven of Mr. Deree's nieces and nephews filed the present suit. The plaintiffs submit, and the defendants do not disagree, that this action could not have been brought in Arizona because the defendants are not amenable to personal jurisdiction there. The complaint alleged that Mr. Glick knew that Mr. Deree was mentally incompetent, nearly blind and deaf, and acting under the undue influence of Mrs. Deree when he prepared the May 1981 amendment to the Trust. The plaintiffs asserted causes of action for legal malpractice, breach of contract to the plaintiffs as third-party beneficiaries of the Trust, breach of fiduciary duty, and interference with the plaintiffs' inheritance from the Trust. After the parties had completed discovery, the defendants filed a motion for summary judgment and the plaintiffs filed a cross-motion for partial summary judgment. The defendants' motion contended that the plaintiffs' action was barred by the finality of the Arizona probate proceedings. However, the defendants did not question the district court's subject matter jurisdiction. The district court rejected the defendants' argument that the action was barred by the finality of Arizona probate proceedings. However, the court went on to consider, *sua sponte*, whether the plaintiffs' suit should nevertheless be dismissed for lack of subject matter jurisdiction. The court concluded that the probate exception to federal di-

versity jurisdiction applied in this case and dismissed the plaintiffs' suit. This appeal followed.

II

Analysis

The general framework for the exercise of federal diversity jurisdiction is set forth in 28 U.S.C. § 1332. The statute provides in relevant part:

> (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—
>
> (1) citizens of different States;
>
> (2) citizens of a State and citizens or subjects of a foreign state;
>
> (3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and
>
> (4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

28 U.S.C. § 1332(a). The statute says nothing about an exception to diversity jurisdiction for probate matters. The exception is created by the judiciary, not by Congress. Consequently, we must construe the exception narrowly. *See Rice v. Rice Foundation*, 610 F.2d 471, 475 (7th Cir. 1979) ("[T]he federal courts construe the meaning of 'probate' quite narrowly to limit the scope of the exception."); *see also Loyd v. Loyd*, 731 F.2d 393, 397 (7th Cir. 1984) (the probate exception is not a hard and fast jurisdictional rule, and federal courts have shown some willingness to find the exception nonoperable). The precise scope of the probate exception has not been clearly established. *See Rice*, 610 F.2d at 475-76. Certainly the actual probate of a will is within the exception. *See Markham v. Allen*, 326 U.S. 490, 494 (1946); *Rice*, 610 F.2d at 475. Beyond that,

the contours of the exception are vague and indistinct. As a general matter, courts tend to view the probate exception as extending to all suits "ancillary" to the probate of a will. *See, e.g., O'Callaghan v. O'Brien*, 199 U.S. 89, 110 (1905); *Dragan v. Miller*, 679 F.2d 712, 715 (7th Cir.), *cert. denied*, 459 U.S. 1017 (1982); *Rice*, 610 F.2d at 476. However, the definition of "ancillary" is not well established. *Cf. Rice*, 610 F.2d at 476.

While the scope of the exception has not been established definitively, this court has identified several bases for the probate exception that can serve as useful guides to decision. *See Dragan*, 679 F.2d at 713-17; *Rice*, 610 F.2d at 475-76. The first of these bases is historical. *Dragan*, 679 F.2d at 713. "The Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 78, conferred on the federal courts, in diversity cases, concurrent jurisdiction over 'all suits of a civil nature at common law or in equity.' " *Id.* Because "suits of a civil nature at common law or in equity" were assigned in eighteenth-century England either to common-law courts or the chancery court, and since probate matters were assigned to the ecclesiastical court, it is at least arguable that probate matters "were not included in the Judiciary Act's grant of jurisdiction to the federal courts." *Id.* Apparently for this reason, the Supreme Court said in *Markham* that "a federal court has no jurisdiction to probate a will or administer an estate . . . ." 326 U.S. at 494. A second, and "practical," rationale for the probate exception is the need for legal certainty concerning whether probate matters and will contests should be in state or federal courts. *Dragan*, 679 F.2d at 714. "Certainty is desirable in every area of the law but has been thought especially so with regard to the transfer of property at death." *Id.* The thrust of this rationale is that state courts may be the better situs for probate matters because of the relative expertise of state courts with respect to their own probate law. *Id.* A third rationale is judicial economy. *Id.* By restricting probate matters and will contests to state courts, questions as to a will's validity can be resolved concurrently with the task of estate administration.

Finally, a fourth rationale for the exception is to avoid unnecessary interference with state probate proceedings. *Rice*, 610 F.2d at 475. "Once a suit can be characterized as not involving 'pure probate,' the inquiry . . . becomes whether resolution of the suit by the federal court will result in 'interference' with the state probate proceedings or the assumption of general probate jurisdiction." *Id.* at 475-76.

The application of these factors to the case before us makes it clear, we believe, that the probate exception to diversity jurisdiction is not applicable here. Neither historical considerations nor the more practical consideration of certainty in probate matters require the application of the exception. This case does not involve the actual probate of a will; nor does it affect directly the probate res. Mr. Deree's estate has been distributed conclusively in the Arizona probate action and this suit will not affect its distribution. By contrast, this suit involves an allegation of attorney misfeasance with respect to the preparation of an inter vivos trust;[2] the plaintiffs do not seek to disturb the finality of the Arizona probate proceedings. Consequently, we find no merit in the argument that because Mrs. Deree may be held liable for damages in a third-party action, this lawsuit "is a mere continuation of the probate proceeding." Appellees' Br. at 20. It is Mrs. Deree's own assets, not the assets of the testator, that may be placed in jeopardy by a hypothetical third-party action; Mr. Deree's assets have been distributed conclusively.

The third purpose of the probate exception, judicial economy, would not be furthered by applying the exception

[2] The plaintiffs argue that the probate exception is inapplicable here because this action relates to the execution of an inter vivos trust, not to a will. We reject such a *per se* rule. The inter vivos trust is clearly a will substitute. However, the fact that this case does involve a will substitute does not automatically render the probate exception applicable. *Cf. Dragan v. Miller*, 679 F.2d 712, 715 (7th Cir.), *cert. denied*, 459 U.S. 1017 (1982).

here. The parties do not dispute that this suit could have been brought only in Illinois because the defendants were not amenable to personal jurisdiction in Arizona. Mr. Deree's will was probated in Arizona. In such a circumstance, application of the probate exception clearly would not further judicial economy.

The fourth rationale is "the desire of the federal courts to avoid interference with state probate proceedings." *Rice*, 610 F.2d at 475. Here, application of the exception to diversity jurisdiction is not necessary to avoid interference with the state's "assumption of general probate jurisdiction," *Id.* at 476. In *Robinson v. First State Bank of Monticello*, 454 N.E.2d 288, 294 (Ill. 1983), the Illinois Supreme Court held that all will contests—including causes of action which, although will contests in name, have the effect of challenging the validity of the will—must be resolved in a single proceeding. However, the Illinois Supreme Court restricted *Robinson* in *Ogle v. Fuiten*, 466 N.E.2d 224, 227 (Ill. 1984). The court in *Ogle* held that claims for negligence and breach of contract against an attorney in connection with the drafting of a will are not properly part of a will contest. Therefore, they do not constitute impermissible collateral attacks on the judicial determination of the validity of the testator's will. *Id. Ogle*, not *Robinson*, clearly is the relevant guidepost for this case. Thus, at least under Illinois law, the plaintiffs' suit here does not present a matter ancillary to the probate of a will.[3]

[3] Assuming *arguendo* that this suit had been brought in Arizona—an impossibility given the fact that there can be no *in personam* jurisdiction in that state over the defendants—the consideration of noninterference with state probate matters would not require invocation of the exception. It appears that the suit would have been heard by the Civil Division of the Superior Court, a court of general jurisdiction, not by the specialized Probate Division of the Superior Court. *See generally* Ariz. Rev. Stat. § 14-6201(A) (inter vivos trust providing for distribution of assets upon death is nontestamentary). The litigation history of the plaintiffs' earlier suit against Mrs. Deree strongly supports this conclusion. Although

(Footnote continued on following page)

Conclusion

None of the policy concerns that support the judicially crafted, and therefore narrow, probate exception to congressionally mandated diversity jurisdiction militate in favor of invoking that exception in this case. Accordingly, the judgment of the district court is reversed.

REVERSED

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

---

[3] *continued*

Mr. Deree's will was probated in the Probate Division of the Superior Court, the suit against Mrs. Deree was filed in the Civil Division. The defendants then filed a motion to transfer the case to the Probate Division, but this motion was denied. *See Georges v. Wilson*, No. C 492073, order at 1 (Super. Ct. Ariz., Mar. 22, 1985); Appellants' App. at 27a. If this earlier suit was not a probate matter under Arizona law, then it is inconceivable that the instant action—which is far more tangential to the probate of Mr. Deree's will—would be a probate matter.

USCA 79004—Midwest Law Printing Co., Inc., Chicago—9-14-88—475

APPENDIX B

JUDGMENT – ORAL ARGUMENT

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

September 14, 1988.

Before

Hon. RICHARD D. CUDAHY, Circuit Judge

Hon. JOEL M. FLAUM, Circuit Judge

Hon. KENNETH F. RIPPLE, Circuit Judge

BASIL GEORGES, et al.,
Plaintiffs-Appellants,

No. 87-3129 *vs.*

MARVIN GLICK, an Illinois citizen, BAUM, GLICK & WERTHEIMER, an Illinois law firm,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 86-C-0747

Charles R. Norgle, Judge.

This cause was heard on the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, REVERSED, with costs, in accordance with the opinion of this Court filed this date.

APPENDIX C

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

October 31, 1988.

Before

Hon. RICHARD D. CUDAHY, Circuit Judge

Hon. JOEL M. FLAUM, Circuit Judge

Hon. KENNETH F. RIPPLE, Circuit Judge

BASIL GEORGES, ALEXANDER GEORGES, GEORGE J. GEORGES, TED GEORGES, DOROTHY G. STACY, EFROSINI DEREHANIS and DORA DEREHANIS,

Plaintiffs-Appellants,

No. 87-3129 *v.*

MARVIN GLICK, and BAUM, GLICK & WERTHEIMER,

Defendants-Appellees.

Appeal from the United States District Court, Northern District of Illinois, Eastern Division.

No. 86-C-0747.

Charles R. Norgle, Judge.

ORDER

On consideration of the petition for rehearing and suggestion for rehearing en banc filed in the above-entitled cause on September 28, 1988 by the defendants-appellees, no judge in active service has requested a vote thereon, and all the judges of the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

APPENDIX D

United States District Court,

Northern District of Illinois,
Eastern Division

December 4, 1987

Basil Georges

vs.

Marvin Glick

No. 86-C-747

Judge
Charles R. Norgle

DOCKET ENTRY

[Other docket entry:] Cause dismissed for lack of subject matter jurisdiction.

(For further detail see order attached to the original minute order form.)

Docketing to mail notices.

Courtroom deputy's initials: EF

Date/time received in Central Clerk's Office: '87 DIC-4 P5:01

Document # 97

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

BASIL GEORGES, a Texas citizen; ALEXANDER GEORGES, a Wisconsin citizen; GEORGE J. GEORGES, a Texas citizen; TED GEORGES, a Texas citizen; DOROTHY G. STACY, a Wisconsin citizen; EFROSINI DEREHANI, a Greek citizen; DORA DEREHANI, a Greek citizen,

Plaintiffs,

vs.

MARVIN GLICK, an Illinois citizen, BAUM, GLICK AND WERTHEIMER, an Illinois law firm,

Defendants.

No. 86 C 747
JUDGE
CHARLES R. NORGLE

ORDER

Before the court are defendant's motion for summary judgment and plaintiffs' motion for partial summary judgment. For the following reasons, this action is dismissed for lack of subject matter jurisdiction. *See* Fed. R. Civ. P. 12(h)(3).

There is no dispute as to the dispositive facts. Only their legal significance is at issue. The controversy arises out of the distribution of William Deree's estate. Plaintiffs are Deree's nephews and nieces. Defendant Glick was the attorney for a trust established by Deree to which a legacy was provided under the terms of Deree's will. On May 29, 1981, Glick drafted an amendment to the trust which allegedly substantially reduced the amount to which

plaintiffs were entitled under the provisions of the trust prior to its amendment.

Deree died in Arizona in November, 1982 and an informal probate of his will was filed there on June 13, 1983. In July 1983, plaintiffs brought suit in the Arizona Superior Court to set aside the May 29 amendment on the grounds Deree was mentally incompetent and acting under undue influence when it was prepared. Defendants in that action were Deree's widow, Roberta, and Rex Wilson. The defendants were sued both in their individual capacity and in their capacity as trustees of the Deree trust. Glick was not a party to that suit. In January, 1984, another nephew of Deree brought suit against Roberta Deree and Rex Wilson as individuals and as trustees in the Circuit Court of Cook County. That suit sought to have the amendment set aside on the same grounds. Neither Glick nor the plaintiffs in the present case were parties to the Illinois suit. Both lawsuits were settled pursuant to an agreement releasing the signatories from any liability arising out of the Deree trust. Under the terms of the settlement agreement, plaintiffs agreed to dismiss the two lawsuits and any other pending lawsuits in which one or more of the parties to the agreement were joined. Glick was not a party to the settlement agreement.

In the present case, plaintiffs allege Glick knew Deree was mentally incompetent, nearly blind and deaf, and acting under the undue influence of his wife, Roberta Deree, and his accountant, Benjamin Beckman, when he prepared the amendment to his will. Count I of the amended complaint alleges plaintiffs, as third party beneficiaries of the trust, were damaged by Glick's breach of his contractual obligation to provide competent, reasonable, and prudent legal services to the trust. Count II alleges Glick committed legal malpractice when he amended the trust. Count III alleges Glick breached his fiduciary duty to plaintiffs as trust beneficiaries. Count IV is based on Glick's alleged

tortious interference with plaintiffs' inheritance from the trust. Count V seeks punitive damages.

Defendants contend plaintiffs' claims constitute an impermissible collateral attack on the validity of the amended trust agreement. They argue plaintiffs' failure to file a will or trust contest with in the limitations period set by Illinois statute conclusively establishes the validity of the amended trust agreement for all purposes. Defendants rely on the 6 month limitations period applicable to actions seeking to set aside or contest the validity of trust agreements to which a legacy is provided by the settlor's will. *See* Ill. Rev. Stat. ch. 110, §13-223 ("Section 13-223"). Section 13-223 is restricted to wills which are admitted to probate and the limitations period is "within the time to contest the validity of a will as provided in the Probate Act of 1975 as amended." *Id.* The Probate Act provides that will contests must be filed "within 6 months after the admission to probate of a domestic or foreign will in any court of this State. . . ." Ill. Rev. Stat. ch. 110 1/2 §8-1 ("Section 8-1").

Defendants' argument on the applicable limitations period is nebulous. Defendants do not specifically state when the 6 month limitations period which they claim applies to plaintiffs' claims began to run. Apparently, they are contending the 6-month period began to run when the Deree will was probated in Arizona. That position is untenable. The filing of a will for probate in an Illinois court not only triggers the running of the limitations period, it is also a prerequisite to the filing of a will contest. *See Sternberg v. St. Louis Union Trust Co.*, 394 Ill. 452, 68 N.E.2d 892 (1946). Clearly the trust contest provision must incorporate the act which triggers the limitation period along with its time sequence.

Illinois provides for the admission to probate of a will which has been admitted to probate in another state. Such wills may be contested in the same manner as domestic

wills. *See Sternberg*, 68 N.E.2d at 897. It follows the 6-month period of limitations for the filing of will contests does not begin to run on wills admitted to probate in another state until those wills are probated in Illinois. Applying a different rule to the trust contest provision would permit the statute to run out on testamentary trusts before the limitations period on will contests even began to run. This could not have been the Illinois legislature's intent in enacting Section 13-233. The court concludes the statute of limitations which defendants claim bars this action never began to run because the Deree will was never admitted to probate in Illinois.

The court's inquiry cannot end there, however, because the essential question is not whether Section 8-1 applies, but whether the policy underlying Section 8-1 and the Illinois cases which have outlined its applicability to other causes of action, dictate the conclusion that this case falls within the probate exception to the court's diversity jurisdiction. *See Dragan v. Miller*, 679 F.2d 712 (7th Cir. 1982). In *Dragan*, the Seventh Circuit identified considerations relevant to a determination of whether a case falls within the probate exception. The court indicated that the objectives of the probate exception were to establish legal certainty regarding whether a federal or a state court would decide the validity of wills, to provide deference to the relative expertise of state courts in probate matters, and to facilitate judicial economy. *Dragan*, 679 F2d at 716-17. The court found these considerations would be weakened if Illinois allowed the action to escape the exclusivity provisions of Section 8-1. *Id.* at 717. The *Dragan* court specifically noted that no Illinois court had held actions for tortious interference with inheritance could only be brought under Section 8-1. *Id.* The court predicted that Illinois would hold the case before it subject to Section 8-1. That prediction was based on Illinois cases which refused to allow plaintiffs to avoid Sections 8-1's application by relabeling the form of the action. The court distinguished

Nemeth v. Benhalmi, 99 Ill. App. 3d 493, 25 N.E.2d 1187 (1981), which held Section 8-1 was inapplicable because the will in that case had never been probated. In *Dragan*, the will had been probated. Based on its conclusion that Illinois would hold Section 8-1 inapplicable, the *Dragan* court concluded the case before it fell within the probate exception.

Since the *Dragan* decision, the Illinois Supreme Court has ruled on the applicability of Section 8-1 to actions based on the tort of interference with inheritance. *See Robinson v. First State Bank of Monticello*, 97 Ill. 2d 174, 454 N.E.2d 288 (1983). In *Robinson*, plaintiffs sought recovery against the executor, a bank, on a breach of fiduciary duty theory. Plaintiffs alleged the bank's failure to disclose the existence of a document caused them to enter into a settlement agreement which precluded them from exercising their right to file what they maintained was a meritorious will contest. The Illinois Supreme Court affirmed the dismissal of the counts against the bank adopting the appellate court's reasoning as its own. *Robinson*, 454, N.E.2d at 293. The appellate court had dismissed the counts against the bank on the ground that recovery would have first required a determination that the will, which had been probated without contest, was invalid.

The reasoning of the *Robinson* court in dismissing the counts against the bank is applicable to the present case. In *Robinson*, the undisclosed information allegedly prevented the plaintiffs from exercising their right to file a will contest. To find the bank liable, it would have been necessary to find the contest would have been meritorious. Similarly, in the present case, plaintiffs allege Glick's conduct resulted in an amendment to the trust agreement which the decedent did not intend. To recover against Glick, plaintiffs will have to prove that the provisions of the trust amendment could have been set aside if they were contested in the Arizona probate proceeding. In both

cases, the merits of the instruments' validity would have to be reached.

The plaintiffs in *Robinson* also sought recovery against an attorney who they claimed unduly influenced the testator into executing a will which made the attorney the beneficiary of a substantial amount of money. Like the claim in the present case, the claim against the attorney was based upon abuse of fiduciary position and tortious interference with plaintiffs' inheritance. In reversing the appellate court's decision to not dismiss the count against the attorney, the *Robinson* court stressed that the purpose of Section 8-1 was to insure the orderly administration of decedents' estates. *Robinson*, 434 N.E.2d at 294. Viewing the claim against the attorney as permitting plaintiffs a "second bite of the apple", the court stated it would "refuse to have Section 8-1 circumvented by allowing [plaintiffs] to maintain a tort action which in its practical effect would invalidate a will that has become valid under the Probate Act of 1975." Like the *Dragan* court, the *Robinson* court distinguished *Nemeth v. Benhalmi*, 99 Ill. App. 3d 493, 425 N.E.2d 1187 (1981), on the ground that in that case no will was ever admitted to probate. The court limited the *Nemeth* court holding to cases where a will contest remedy was unavailable.

The court finds the *Dragan* and *Robinson* decisions dispositive. Plaintiffs had an opportunity to contest the validity of the trust in the Arizona probate proceeding, but instead chose to settle their differences with the beneficiaries who benefited under its amended provisions. The *Robinson* decision places a premium on the finality of probate proceedings and forbids interference with the distribution of estates long after such proceedings have concluded. To reopen whether the trust amendment is valid this late in the game would frustrate those purposes, and would also lead to uncertainty regarding whether a federal court in a distant forum or a state court exclusively would test

the validity of a will. Also, the matters which would necessarily be litigated in this case (e.g. testator's capacity, undue influence) are matters at which the state courts are more expert than are federal courts. Interference with the distribution of Deree's estate is a real possibility in this case, despite the fact that the defendants were not beneficiaries under the trust agreement. The undue influence charge directly implicates the beneficiaries from whom the defendant would no doubt seek to recover in a third-party action if this action were permitted to proceed. The result could very well be that the plaintiffs will indirectly recover from the beneficiaries they have agreed not to sue. In sum, the court finds this case falls within the probate exception to its diversity jurisdiction.

The fact that the Deree estate was never probated in Illinois does not require a contrary result. As noted above, the significance of Section 8-1 and the cases interpreting it, lies in the deference they afford to probate proceedings which have come to an end. The fact that Section 8-1 does not apply as the statute of limitations cannot justify ignoring those important considerations. Moreover, unlike the plaintiffs in *Nemeth*, plaintiffs had sufficient opportunity to contest the validity of the trust amendment.

For the foregoing reasons, this case is dismissed for lack of subject matter jurisdiction.

IT IS SO ORDERED.

ENTER:

/s/ CHARLES RONALD NORGLE, Judge
Charles Ronald Norgle, Judge
U.S. DISTRICT COURT

DATED: 12-2-87